

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-13-1179

Appellee

Trial Court No. CR0201301683

v.

Aubrey Dale Marshall

DECISION AND JUDGMENT

Appellant

Decided: February 28, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Laurel A. Kendall, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Aubrey D. Marshall, appeals from the July 30, 2013 judgment of the Lucas County Court of Common Pleas convicting him of two counts of rape, both violations of R.C. 2907.02(A)(1)(b) and (B).

{¶ 2} Pursuant to the guidelines set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), appellant's court-appointed counsel has filed an appellate brief and motion to withdraw as counsel. She mailed a copy of the brief and motion to appellant and informed him that he had a right to file his own brief, but he did not do so.

{¶ 3} Appellant's counsel states in her motion that she thoroughly reviewed the record in this case and concluded that the trial court did not commit any error prejudicial to appellant. However, in compliance with the requirements of *Anders*, appellant's counsel has submitted a brief setting forth the following potential assignments of error:

First Potential Assignment of Error: Appellant's sentence of two life sentences, to be served consecutively, with parole eligibility after fifteen (15) years in both cases, is cruel and unusual punishment pursuant to the Eighth Amendment of the U.S. Constitution and Art. 1, Sec. 9 of the Ohio Constitution.

Second Potential Assignment of Error: Appellant's two convictions should be considered allied offenses of similar import such that the sentences for each are subject to a merger under R.C. 2941.25.

{¶ 4} Appellant's appointed counsel has included arguments which support these assignments of error, but concludes that they are unsupported by the record and/or by the law. Therefore, she concludes that an appeal would be frivolous. We have reviewed the

entire lower court's proceedings and have determined that there is no merit to the errors alleged by appellant's appointed counsel.

{¶ 5} In her first proposed assignment of error, appellant's counsel argues that appellant's sentence amounts to cruel and unusual punishment. We disagree. A sentence that falls within the statutory limits cannot be classified as cruel and unusual punishment. *State v. Ramirez*, 6th Dist. Lucas No. L-11-1263, 2013-Ohio-843, ¶ 19, citing *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). Furthermore, sentences for multiple offenses must be evaluated separately rather than by their cumulative impact. *Ramirez*. In this case the sentence for each offense was less than the statutory maximum.

{¶ 6} In her second proposed assignment of error, appellant's counsel argues that the two offenses are allied offenses of similar import. The relevant test is whether it is possible to commit the offenses with the same conduct. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 48. In this case, appellant admitted to committing two rape offenses, which were the result of independent and different conduct. Therefore, the two offenses are not allied offenses subject to merger.

{¶ 7} Finally, this court has the obligation to fully examine the record in this case to determine whether an appeal would be frivolous. *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. Our review of the record does not disclose any errors by the trial court which would justify a reversal of the judgment. Therefore, we find this appeal to be wholly frivolous. Counsel's request to withdraw as appellate counsel is found well-taken and is hereby granted.

{¶ 8} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal. The clerk is ordered to serve all parties with notice of this decision.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.